
**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52

**Reply Comments of the
American Federation of Musicians
of the United States and Canada, AFL-CIO**

The American Federation of Musicians of the United States and Canada, AFL-CIO (“AFM”), submits these reply comments in response to the Commission’s above-captioned Notice of Proposed Rulemaking, and to the comments filed in the proceeding to date, particularly those on the principle of nondiscrimination and on the definition, scope and operation of reasonable network management. Plainly, a number of commenters see network openness, on the one hand, and the protection of copyrighted material on the Internet, on the other hand, as antithetical to each other, and their comments are informed by this sense of opposition. But the AFM agrees wholeheartedly with Chairman Genachowski’s statement on September 21, 2009 that “[t]he enforcement of copyright and other laws and the obligations of network openness can and must co-exist.”

The AFM is an international labor organization composed of over 230 Locals across the United States and Canada, with over 90,000 professional musician members. AFM members perform live music of every genre – from symphonic and opera to Broadway musicals, and from jazz, country, folk and rock to Latin, hip-hop, blues and pop – and in every size and type of venue from major concert halls to the smallest bars and lounges. AFM members record music pursuant to industry-wide agreements negotiated by the AFM with the recording, motion picture, television, radio and commercial announcement industries, so that their work is an integral part of the sound recordings, movies and television programs that make up so much of America’s culture and America’s economy. AFM members include studio musicians who record film scores and appear as “background” performers on sound recordings. They also include featured

artists of every type, from the glamorous and successful, to the mid-tier artists with solid careers and loyal fan bases, to the emerging artists who are struggling to succeed in the business.

The Internet is crucially important to AFM members, who use it and are affected by it in a multitude of different ways. The AFM and its members have struggled to preserve and enhance the role of live music performance in America's culture and economy for most of the AFM's one-hundred-year-plus existence, and the Internet now plays a very significant role in that important mission. AFM Locals use the Internet not only to communicate with AFM members, but also to reach out to their local communities, educating them on the desirability and availability of live music, and providing referral services that serve the twin goals of leading local community members to choose live music and providing gigs to musicians. But this is just the beginning.

For individual musicians and groups, the Internet provides a means not only to advertise and expand their live performances, but also to sell their recordings on sites like iTunes and CD Baby, or on their own websites, or to reach audiences via streaming services like Pandora or Slacker. Indeed, the Internet has become a means to promote all facets of their careers by communicating directly to the public and building relationships with fans and potential fans. This is true for virtually all musicians, but particularly for the many musicians who record with small or intermediate-size independent labels, or who form their own labels and are building careers with little or no outside investment. It is also true for large and small arts associations like symphony, opera and ballet orchestras, who increasingly rely on the Internet as a means of growing their relationships with and support from the public as well as a means of promoting their live performance seasons and distributing recordings of their music.

As the Association of Independent Music noted in its comments filed on March 8, 2010, the Internet provides a "potent platform for entrepreneurship" – it allows musicians and arts institutions to bring more diverse music to more people without being stymied by the need for relationships with big market players, reliance on big radio, or dependence on distribution methods controlled by major corporations. A free and open Internet, as protected and enhanced by the six principles articulated by the Commission in its proposed regulations, is crucial to the ability of a wide range of musicians, artists and arts institutions to reach and engage with the public, distribute their music and survive as sources of art and culture. This is not just a matter of parochial financial importance to musicians who want to make music without needing "a day job." It is also a matter of cultural, civic and economic importance to all Americans. A free and open Internet is necessary so that political and cultural speech is protected, the widest range of music can have access to a barrier-free digital marketplace, and innovation and competition can benefit the economy.

Freedom on the Internet should not, however, mean a rampant freedom to steal music, movies or other creative works. The AFM stands with other members of the creative community, including the Songwriters Guild of America, the American Federation of Television and Radio Artists, the Directors Guild of America, the International Alliance of Theatrical Stage Employees, the Screen Actors Guild, the Recording Industry Association of America, the Motion Picture Association of America and the American Association of Independent Music in deploring the flagrant and ubiquitous use of the Internet for the purpose of copying and distributing copyrighted works without permission or payment – in short, for theft.

The industry and union commenters have documented the deleterious effect of Internet piracy on the U.S. recording and motion picture industries, and on the American economy as a whole. Most particularly, our sister unions and the Songwriters Guild of America have documented the effect of piracy on ordinary creative workers – the singers, directors, actors and writers who depend on income from the lawful exploitation of music and movies, in initial sales and in downstream or “secondary markets” uses, to house their families, raise their children and fund their retirements. It is all too easy for those engaged in Internet piracy – or those who claim that nondiscrimination on the Internet precludes copyright enforcement – to tell themselves that they are only hurting nameless and faceless corporate interests, or rich celebrities who have it made. But in reality they are hurting many thousands of creative workers who are neither rich nor celebrities.

Like members of the other entertainment unions, musicians have been hurt by Internet piracy. Those who work as session musicians under the AFM’s industry-wide recording agreement have been hurt by declining sales, both because industry contraction means fewer recording sessions, and because declining sales income translates into a reduction of the payments related to sales which musicians receive pursuant to the AFM agreement. Those who record as featured artists for major or independent labels are hurt by declining investment; those who are entrepreneurs trying to make a go of it on their own face losses when “fans” steal what they are trying to sell. Musicians who work under the AFM’s industry-wide motion picture agreement are similarly hurt by industry retrenchment and by declining secondary market income in which they share. Working musicians are as varied as any human group can be, but they have in common several things: they are talented, they are hardworking, they create products of value to us all, and they seldom have a regular paycheck but instead rely on lawful distributions of their work in order to earn a living. Internet piracy hurts musicians across the board, whether they are big names or aspiring unknowns, and whether they are partnered with major or independent labels or are among the new do-it-yourselfers.

The human cost of Internet piracy to creative workers is high, but the economic and cultural price to our whole society is also high. The Commission’s policy on net neutrality has always focused clearly on protecting only access to lawful content and lawful transfers of

content, and the AFM agrees that the emphasis on lawfulness is imperative. It must also be meaningful: it is not enough, as some “public interest” commenters do, to agree that the neutrality rules protect only lawful content and lawful transfers, but insist that preventing copyright infringement should not be included within the definition of reasonable network management. That approach simply turns its back on the needs of individual creators and makes a mockery of the principle of lawfulness on the Internet. It forgets that the public has a real interest in the economic survival of musicians and other creators, and in the music and art that they can create only if they can afford to do the creative work they love.

The AFM agrees with Commission’s inclusion of “practices . . . to . . . prevent the transfer of unlawful content . . . and prevent the unlawful transfer of content” within the definition of reasonable network management. Further, the AFM believes that the inclusion of practices to prevent copyright infringement within the definition of reasonable network management should not be merely precatory. Rather, it should impose real obligations on the part of ISPs, and enable them to engage in such practices without fear that doing so puts them at risk of violating the principle of nondiscrimination. At the same time, the AFM agrees with its sister unions and others that the interests of consumers and Internet users of all types in nondiscrimination, privacy and competition must be protected. To strike this balance is difficult, but the Commission should neither accept the invitation of some commenters to allow the Internet to remain saturated with theft in the name of neutrality, nor allow ISPs and business interests to become new gatekeepers in the name of copyright enforcement.

In order to give real meaning to the restriction of neutrality and nondiscrimination to lawful content, the Commission should, in the first instance, require ISPs to incorporate reasonable practices to prevent copyright infringement on their networks into their network management systems. Rather than prescribing specific technologies, the Commission should develop best practices guidelines for the detection of infringing content and transfers, the accurate identification of infringing material, and appropriate and graduated responses to infringement when it is detected. The development of these best practices guidelines should involve all stakeholders.

Detection practices permitted under the best practices guidelines should be effective but as minimally invasive as possible to do the job. Verification should make use of advances in technology such as watermarking, fingerprinting, digital hash technology, and efforts must be made to develop an independent and reliable database of copyrighted works so that the identification of infringing works will be increased and false identifications will be increasingly diminished. And, best practices should include graduated responses to detected infringement. Responses could begin, for instance, with a notice that informs the infringer that he has been detected and requesting that he acknowledge and desist; subsequent and repeated infringing activity should meet with responses of increased severity but with due process protections so that

an alleged infringer will not suffer draconian curtailment of services without an opportunity to challenge the accuracy of the infringement allegation.

The Commission's task – to moderate the discussion, sort through the comments engendered by the whole range of interests, and forge a regulatory path that both protects the open Internet and the copyrighted content on it – is a difficult one, but necessary if the Internet is to be a source of benefit to the many in society and not just the few, and if it is to be prevented from inflicting further grievous harm on the creators whose content gives it much of its value.

Respectfully submitted,

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